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MARYLAND'S WETLANDS, MARSHES  
AND SUBMERGED LANDS  
IN THE CONTEXT OF COMMON AND STATUTORY LAW

REVISED

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Maryland State Planning Department.

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## INTRODUCTION

The discussion of the legal relationship of Maryland's wetlands, marshes and submerged lands or bottoms found in this Report is drawn entirely from reference sources, State statute, personal experience and discussion with staff members of the responsible Federal and State agencies. This represents an effort by the State Planning Department to analyze and logically present the most widely acknowledged understanding of Maryland common law, statute and administrative procedure relative to the subject.

It is not the intention of the analysis and discussion to formulate original legal opinion. To the extent that legal opinion - as opposed to common law and statute - is cited, it is a reflection of Court decisions and formal opinions of the Maryland Attorney General.

Detailed inventory and biologic data and information will be found in the completed Wetlands Study. However, the preliminary inventory analysis of wetland, marsh and submerged land or bottom acreages by legal or ownership status is presented to place into perspective the inter-relationship of these land areas and existing State policy and statute.

Based upon the total analysis, several recommendations have been formulated. These recommendations are viewed as a basic rationale for proposed wetland protection legislation.



## FINDINGS AND RECOMMENDATIONS

The intent of early common law and subsequent statutory law appears to be unambiguous towards the question of public vs. private rights and privileges relative to the wetlands, submerged lands and marshes in Maryland.

A guiding philosophy has been the attempt to protect both the public interest and riparian rights and privileges in the navigable waters of the State. Examples of this philosophy are:

1. protection under common law and statute of the public interest in navigation and fishing irrespective of ownership of the submerged tidal lands;
2. statutory protection is granted tidewater riparian's privileges to the first use of marsh for location of a duck blind and gunning and the positioning of fishing nets and haul seines; and
3. establishment of administrative procedures necessary to obtain the riparian's privilege of erecting a pier, bulkheading and dredging and filling - all of which in any specific instance may otherwise constitute an infringement on the public interest in free navigation and a de facto taking of State owned property rights.

Non-navigable waters were never construed to be under the protection of the "public interest" philosophy by early common law and early statutes. However, more recent statutory developments and evolutionary legal interpretations of the riparian doctrine have restricted the private riparian's rights and privileges in non-navigable, free-flowing waterways in Maryland to the extent that a riparian cannot adversely affect the riparian rights and privileges of others. These restrictions are most apparent in matters concerning waste treatment and water quality. Also, it is a statutory mandate that a permit is required of a private or corporate appropriator of the waters of the State. A more recent statute has re-defined the "waters of the State" to include the 50-year flood plain. And, any alteration of the "course, current, or cross-section" of any of the waters of the State cannot proceed until a permit for such has been issued by the Department of Water Resources.

There is no legal evidence that the State in any of its statutory actions has attempted or intended to limit a riparian proprietor's right to make reasonable improvements to his property. Such improvements include access to navigable waters, mosquito control and protection against shore erosion.

The State has deemed it to be in the public interest to assist private landowners who desire to protect their property from shore erosion. By construing the protection of private rights to be in the general public interest (under the doctrine of accretion, a person can claim natural additions to his property, but must also accept the natural loss of his property), the State has established a similar precedent for the active protection of the public interest in wetland, submerged land and marsh as such.





Acreage losses for the various wetland, marsh and submerged land or bottom types are as follows:\*

	<u>Acres</u>
1. Tidal marsh	6,800
2. Non-tidal salt marsh	2,500
3. Inland freshwater marsh	12,800
4. Bottom areas filled over with spoil	10,900**

The wetlands, marsh and submerged lands of the State fall into four legal categories. These are:

1. land forms that fall within the navigable waters of the State and have not been granted, patented or titled and so remain in complete State ownership;
2. land forms that fall within the navigable waters of the State, but have been granted, patented or titled and thus restrict public rights of use to navigation and fishing while extending aspects of common law riparian doctrine to these waters;
3. land forms that fall within the free flowing, non-navigable waters of the State where common law riparian doctrine applies; and
4. land forms that fall in neither the navigable nor the free-flowing, non-navigable category and where common law property rights are in full effect.

Maryland is, to a degree, fortunate in that a large body of statutory law exists which prescribes the jurisdictional, administrative and procedural handling of private and public actions affecting the tidal waters and submerged lands of the State and the waters of the State in general. By legislative direction, this responsibility has in large measure been placed with the Board of Public Works and the Department of Water Resources. Other State agencies represented on the Board of Natural Resources have traditionally acted in an advisory role to the Board of Public Works on matters affecting the State's natural resources and submerged lands and more recently have in addition been advising the Department of Water Resources.

The policy and procedure which has evolved for handling wetland, marsh and submerged land use changes is presently tied directly to the U. S. Army Corps of Engineers' responsibility to grant permits for activity affecting the navigable waters of the State. However, the Corps of Engineers has no statutory authority and jurisdiction over matters of

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\* Based on computations of the Department of Game and Inland Fish.

\*\* The acreage of bottom filled over with spoil is most likely lower than the true acreage.



public interest other than navigation. The testimony of other Federal agencies, while sought by the Corps, does not itself represent a legal jurisdiction over public interest matters affecting the citizens of Maryland. In the instances cited above, the Federal agencies have traditionally deferred to the State for the ultimate decision in all public interest matters excepting that which can be considered exclusively a navigational matter. Even in this instance the guidance of the State has been increasingly sought after.

Such policy and procedure has placed a clear demand on the State to provide a mechanism for evaluating actions which fall under the category of affecting the public interest in navigation and fishing. Not only must the State advise the Corps of Engineers on the disposition of permit requests, but there is a clearly defined need for the State to provide for its own internal control of shoreline development activity. While statute exists and some procedures have been defined to assist the State in this task, a general sense of confusion seems to evidence itself in both the policy and statute guiding jurisdiction and procedure and the procedure itself.

The extent to which zoning by counties has been used to protect the public interest in wetland, marsh and submerged lands is non-uniform and sporadic. There has been little effort to provide State-wide guidelines to the counties on matters of zoning and planning for land areas affected with the public interest.

While Maryland does have a significant background of common law and statutory policy towards wetland, marsh and submerged lands, it is not apparent that actual practice has realized the complete potential of legal precedent through the exercise of State and local responsibility for the health, safety, welfare and well-being of the public and the protection of public rights.

Legal approaches relating to the protection and governance of wetland, marsh, submerged land and flood plains in other states fall into the following four general categories:

1. Legislation is in effect which enables a state to acquire wetlands or any easement, interest or right therein by the following means: eminent domain, purchase, exchange, gift, devise, lease, lease with an option to purchase, payment of unpaid tax liens on the land.
2. Legislation exists which prohibits certain activities in wetland areas.
  - a. Many statutes provide that a project which involves filling, dredging, obstructing or altering the course of waters in wetland areas may not commence without obtaining a permit therefor; any conditions placed upon the work in the permit must be complied with. Many of these statutes provide for fines and imprisonment, and violations are subject to injunction or abatement.



- b. A few statutes prohibit uses of wetlands inconsistent with conservation by zoning wetlands for conservation purposes.
  - c. One statute prohibits the use of earth-moving equipment in wetland areas, unless such equipment is registered with the Department of Water Resources.
- 3. The Long Island (New York) Wetlands Act is unique. It provides that the state may enter cooperative agreements with counties to maintain wetlands and may furnish one-half the cost of maintenance.
  - 4. Legislation not directly related to wetlands, but affecting flood plains, has been enacted by some states. Such legislation requires that a county zone its flood plains to prevent encroachment and consequent damages.

Recent court decisions in Massachusetts suggest that the regulation of marsh destruction under the police power of a state is consistent with the clearly established doctrine that the protection of marine resources is a public purpose. In Maryland, a similar doctrine is evident in the translation of early common law (protection of the public interest in fishing) into present-day statute (Article 66C provides that the planning, development, management and conservation of the Chesapeake Bay and all other tidal waters and the shorelines and bottoms thereof are the responsibility of the State of Maryland).

#### CONCLUSIONS

- 1. General rule is that the State is the owner of land below mean high water.
- 2. Maryland's common law and general statutes recognize that both public interests and riparian rights and privileges are interrelated.
- 3. The relationship between the public interest and riparian right and privilege in marsh and submerged lands patented, granted or titled must be clarified to protect the remaining public rights to navigation and fishing unless specifically restricted by statute.
- 4. Maryland common law and statute make clear that the various uses of tidal wetland, marsh and submerged lands are privileges granted by the State and not common law riparian rights which have no limits. Dredging and filling such land is certainly not a right of unrestricted dimension.
- 5. Tidal marsh and bottom are directly affected by common law and the existing statutory concern for the public interest.
- 6. The critical interrelationship between the biologic and ecologic values of tidal waters, shoreline and bottoms under the protective responsi-





bility of the State requires an administrative procedure capable of fully weighing proposed shoreline and bottom use changes and the effects on the public interest and resources of the State.

7. The public interest in non-tidal, free-flowing waters of the State is under the jurisdiction of the Department of Water Resources, but this jurisdictional responsibility has not yet been interpreted to allow for protection of the public interest in the fresh-water wetlands of Maryland.
8. The public interest in wetland, marsh and submerged land-forms which are fresh water but not a part of the free-flowing portion of the non-tidal waters of the State has not been defined in common law or statute.
9. The public interest in non-tidal salt marshes has not been defined in common law and statute.
10. Maryland common law and statute ascribes to the doctrine that the protection of marine resources is a public purpose.
11. The doctrine of protection of the marine resources as a public purpose has been used by other states as a legal basis for applying the police powers to restrict land use and acquire wetlands by condemnation or other means.
12. There is a clear need to refine and tighten the policy and procedures governing the State's jurisdiction and disposition of actions affected with the public interest in the tidal marsh and bottom of non-tidal, free-flowing waters of the State.

#### RECOMMENDATIONS

1. The State of Maryland should act to strengthen its statutory posture, policy and procedures affecting wetland, marsh and submerged land usage; while at the same time honoring riparian privileges of access to the water, use of marsh and bottom under State waters, and the right to protect the integrity of riparian property.
2. The State should invoke its police powers to protect the public's interest in the marine resources of tidal waters by restricting dredging, filling and other destruction of wetland, marsh and submerged land or bottom and by acquisition through condemnation or other means.
3. The extent of use of police powers of the State should be qualified to allow for variances in wetland, marsh and submerged land use status where justification for the change in status can be shown and the public interest and rights not seriously diminished.
4. Section 485 of Article 27 should be amended to make all removals of commercial material from navigable rivers, creeks and branches subject to all controls existing for other navigable waters of the State.



5. Refine and clarify the State agency jurisdiction and procedures designed to reflect the responsibility for protection of the public interest and rights in actions affecting navigable waters and related wetland, marsh and submerged lands. To further this recommendation, the existing statutory procedures should be expanded to clarify the lines of responsibility between the Board of Public Works, Department of Water Resources and other agencies represented on the Board of Natural Resources.
6. Section 12A of Article 96A should be amended to provide that a permit is required from the Department of Water Resources as well as any shore-line commission, county, municipal or other agency's approval which is required by law prior to undertaking any action which affects the waters of the State.
7. The relationship between the Board of Public Works, Department of Water Resources and U. S. Army Corps of Engineers relative to the action required for approval or denial of Corps permits for activity in navigable waters must be clarified. While the Corps has only jurisdictional concern over the public navigation right, they generally defer to the State for advice on other possible adverse effects on matters of public interest other than navigation. The procedural delays and public inconvenience caused by unclear lines of decision making responsibility can be rectified by State statutory action without affecting the Federal laws and procedures governing the Corps of Engineers.
8. The mosquito control program administered by the State Entomologist at the University of Maryland should be subject to the annual review of the Departments of Water Resources, Game and Inland Fish and Chesapeake Bay Affairs or alternatively the Board of Natural Resources.
9. A fund should be established to be used for the acquisition in fee or otherwise of the title and/or remaining rights to wetland, marsh and submerged lands which are not presently in State ownership. The fund should be composed of payments made to the Board of Public Works for sand and gravel or wetland, marsh or submerged land sold or deeded by the State to private interests.
10. The Department of Water Resources should adopt a consistent administrative policy for handling permits that relate to waters of the State as specified in Sections 12A and 15 of Article 96A. Provisions should be made to review each permit application in terms of adopted Water Quality Standards dealing with disposal of solid matter into State waters which might have an adverse effect on the propagation of marine life (i.e., dredging and filling which result in destruction of fish and wildlife habitat).
11. The policy intent of the statutory addition of the 50 year flood plain to the non-navigable, free-flowing waters of the State should be utilized to secure protection for certain fresh-water wetlands through county zoning and application of the intent of Section 12A of Article 96A.





The legal status of the wetlands, marshes and submerged lands of Maryland is an intimate part of the overall analysis of the relationship of these areas to the economy of the State. During the course of the Wetlands Study authorized in 1967 by H.J.R. No. 2, the services of a legal consultant were engaged to put into perspective several questions relating to Maryland law on this and related subjects. In addition, the consultant conducted a survey of the legal approaches to the question of protection of wetlands in other states.\* The following discussion draws freely from this source as well as others cited below.

### The Roots of Present Law

Maryland law had its origin in English Common Law and the edicts of the King of England. Those aspects of early law of most concern in any legal analysis of wetlands are, 1) a definition of navigable and non-navigable waters; 2) riparian and non-riparian use rights to lands underlying navigable and non-navigable waters; and 3) ownership privileges and rights of land under navigable and non-navigable waters of the State.

In Maryland, navigable waters are defined as

"...those waters which are subject to the ebb and flow of tides.../and/ those waters which are not subject to the ebb and flow of tides are non-navigable, even if they can be used for purposes of commerce or travel. Linthicum v. Shipley, 140 Md. 96, 98 (1922); Wagner v. City of Baltimore, 210 Md. 615, 622 (1955)."

Riparian ownership and use rights to lands under navigable and non-navigable waters originated with the King of England who had authority to make grants of land under any of the waters of his kingdom. In the case of lands bordering non-navigable waters as defined above, the common law presumption was that ownership of riparian lands also included ownership privileges to riparian under-water lands.\*\*\*

The status of lands under navigable waters as defined above is not as straight-forward as that pertaining to non-navigable waters. A grant or patent to land on a navigable waterway by the Crown, Lord Proprietor acting for the Crown under the Charter of Maryland, or the State of Maryland

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\* Dimsey, J. Dennis, 1968. "Wetlands-The Legal Context". pp. 33  
Prepared for the Maryland State Planning Department, (unpublished).

\*\* Dimsey, p. 16. (Early common law considered navigation a public right of tremendous importance. The association of tidal water with navigation thus seems to have been carried over into present-day law and is peculiar to a state with an early history of tidewater dependency.)

\*\*\* Galbreath, Paul M., 1965. Maryland Water Law. p. 31.





prior to 1862, did not automatically include ownership and exclusive use rights of riparian lands underlying navigable waters. However, prior to 1862 a grant or patent to such submerged lands could be made separately or included as an addition to the grant or patent of the bordering fast land. Yet, under no circumstances did such a grant or patent remove the public right of navigation and fishing.\*

51 Opinions of the Attorney General 452 (February 10, 1965) has summarized several of the above points as follows:

"In Maryland, by common law rule, title to all navigable waters and to the soil below the high-water mark of those waters is vested in the State as successor to the Lords Proprietary who had received it by grant from the Crown; 'and so it remains, unless it be included in some grant by the State, made prior to March 37 1862'. Sollers v. Sollers, 77 Md. 148, 151-152 (1892). See Hawkins Point Light-House Case, 39 Fed. 77, 79-80 (1889); see also Gould on Waters, Sections 32, 42 (3d Edition, 1900)."

In 1862, the Maryland Legislature enacted legislation

"...providing that no patent to land shall hereinafter issue for land covered by navigable waters...and any claim to land under navigable waters would have to be supported by a grant from the Lord Proprietor, or a patent from the State of Maryland prior to 1862, showing a definite intent to convey land under these waters (now Article 54, Section 48 of the Maryland Code).

"The Maryland Court of Appeals held that the Act of 1862 prohibiting the issue of any patent to land covered by navigable waters should be so construed as to apply to all lands covered by water at high tide."\*\*

#### Present Law

The earlier antecedents of present Maryland law affecting wetlands, marshes and submerged lands make clear that the present general rule is that the State is the owner of the land below the mean high water mark of navigable waters. In the case of non-navigable waters, common law riparian doctrine applies in similar fashion to water and submerged land alike by granting the riparian landowner extensive privileges of ownership and use consistent with the common law concern for the rights and privileges of other riparian landowners. Common law is, of course, subject to modification or abrogation by statute enacted by the Maryland Legislature.

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\* Galbreath, p. 31.

\*\* Ibid., pp. 31-32.



Section 15 of Article 78A modifies the above general rule by empowering the Board of Public Works to issue deeds for lands under the waters of the State and can attach conditions to such conveyance of right or title.

While the legal question of transferring ownership rights in navigable waters from the State to another party is clearly defined, the situation as it pertains to dredging and making "improvements" to riparian lands is not so precise.

51 Opinions of the Attorney General 452 notes that

"In the absence of specific statutory authority to the contrary,...the right or privilege of dredging any material from the bottom of any part of the Maryland tidewater depends entirely upon the grace of State action. See Potomac Co. v. Smoot, 108 Md. 54, 63 (1908)."

In this regard, the Maryland Legislature has granted tidewater riparians certain dredging rights in submerged lands owned by the State. These rights are summarized below:

"Section 485 of Article 27 gives riparian owners of land bordering on navigable rivers, creeks or branches the rights to dig, dredge, take and carry away sand, gravel from the beds of such waters below the high-water mark.

"This section was strictly interpreted in 51 Opinions of the Attorney General 452. The terms 'rivers, creeks or branches' were held not to encompass a bay. The words 'or other materials' in the phrase 'sand, gravel or other materials' were said to include only those grades of submerged soil specially suited for commercial use.

"Thus this Section, as construed by the Attorney General, confers rights only upon riparian owners of land bordering on navigable rivers, creeks or branches, and the rights conferred are limited to the right to dig, dredge, take and carry away only commercially valuable sand, gravel or similar matter, and not every quality of material in the bed which might be considered suitable fill."\*

Although the riparian landowner on tidewater may not own the adjacent wetland, marsh or submerged lands, the General Assembly has granted such persons privileged rights. Sections 154, 171 and 253 of Article 66C grant riparians the privilege of first preference in duck blind location, reservation of shore for gunning and positioning of nets or hand seines in front of their property respectively.

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\* Dimsey, p. 16.









"Section 46 of Article 54 gives the proprietor of land bounding on any of the navigable waters of the State the right of making improvements into the waters in front of his land, provided such improvements do not interfere with the navigation of the stream of water into which the improvements are made. 51 Opinions of the Attorney General 452 previously cited also construed this section of the Maryland Code.

"The Attorney General reviewed the legislative history of Section 46, as well as judicial decisions construing the section. He concluded that the right to make improvements into the water granted by this section does not confer upon a tidewater riparian proprietor a general right to fill in front of his property. Rather, Section 46 was interpreted as granting a tidewater riparian owner only the right to fill up small areas in connection with wharfing out for the purpose of improving the riparian's own commercial access to deep water."\*

And, while not so indicated above, it is clear that the definition of "improvement" stated in 51 Opinions would also include the right of a riparian landowner to protect his property against shore erosion. This, of course, is the underlying purpose of the Shore Erosion Control Act of 1964.

A summary of the above points is found in 51 Opinions of the Attorney General 452. The main issue at question was the right of a riparian owner (C Corporation) to make new fast land for the purpose of adding considerable acreage to existing fast land. In the opinion of the Attorney General

"The pre-eminent theory of riparian rights which can be found throughout the opinions of the Court of Appeals and those of other courts (Anno. 91 A.L.R.2d 858 (1963), a theory upon which this office acted thirty years ago (20 Opinions of the Attorney General 658) is that the right of title to accretions and the companion right to make improvements into navigable water are both intended, in the words of the title to Chapter 129, to 'protect the rights of owners of lands bounding on...navigable waters.' The reason for the continued existence of these rights is the defensive one of preserving to the riparian his access to navigable water. Cf. Steinham v. Romney, 233 Md. 16 (1963). This reason has nothing in common with C Corporation's plan to exploit the riparian location of its property so as to multiply many times the existing dry land acreage of that property to the detriment of those who enjoy the public rights of navigation (which today must include all forms of boating) and fishery upon the whole natural surface of Assawoman Bay as it is presently constituted.

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\* Dimsey, p. 17.



"This is not to say that these public rights are inviolable, but it is to say that C Corporation cannot interfere with them until the Board of Public Works has reviewed the corporation's plan in detail, has determined that the plan will bring greater public benefit to the area than those public rights presently existing and availed of, has fixed an adequate consideration upon the State's property interests reflected and has contracted with C Corporation in form permitting the project to be undertaken."\*

In the last few years the Maryland Legislature has affixed statutory responsibility for decisions regarding the permissibility of certain actions affecting the waters and lands under the waters of the State short of transfer of title or rights to lands under navigable waters, which is a responsibility reserved for the Board of Public Works. However, in all instances where an action will affect the navigable waters and submerged lands of the State, the action cannot be undertaken without the "grace of the State." And, depending upon the existence and language of earlier statute, the "grace of the State" ultimately rests with an act of the Maryland Legislature or a decision of the Board of Public Works.

Article 96A of the Maryland Code defines the water resources of the State and assigns responsibility for water resources planning, development and conservation to the Department of Water Resources. While several other State agencies have related management and research functions related to water resources (notably the Departments of Chesapeake Bay Affairs and Game and Inland Fish whose concern is the effects of dredging and filling on wildlife and marine life), the Department of Water Resources is responsible for the regulation of 1) water appropriation and quality; 2) actions affecting the waters of the State; 3) construction of dams and reservoirs; and 4) well-drilling and groundwater appropriation. The Department's statutory concern for actions affecting the "waters of the State" is a direct fixation of responsibility for Section 485 of Article 27 and Sections 45 and 46 of Article 54 except as reserved for the Board of Public Works or modified by the Maryland Legislature.

Section 2 of Article 96A defines the "waters of the State" to "include both surface and underground waters within the boundaries of the State or subject to its jurisdiction, including that portion of the Atlantic Ocean within the boundaries of the State, the Chesapeake Bay and its tributaries, and all ponds, lakes, rivers, streams, public ditches, tax ditches and public drainage systems within the State...and the flood plain of free-flowing waters as determined by the Department on the basis of the 50 year flood frequency.... ."

The scope of the definition of "waters of the State" clearly extends regulatory responsibilities of the Department to both navigable and non-navigable waters. While riparian actions in navigable waters were restricted in early common law and statute, the extension of State statutory concern

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\* Opinion of Attorney General, Feb. 10, 1965.





to non-navigable waters and submerged lands and flood plains is a new limitation on earlier common law interpretation of the riparian doctrine as it applied to non-navigable waters.

Furthermore, Section 2 of Article 96A defines "pollution" as "the discharge or deposit into any of the waters of the State of any liquid, gaseous or solid substance or substances which may create a nuisance therein or render such waters unclean or noxious so as to be detrimental to the propagation, cultivation or conservation of animals, fish or aquatic life or unsuitable with reasonable treatment, for ... commercial, industrial, agricultural, recreational or other reasonable uses." Maryland's Water Quality Standards provide for maintaining aquatic life.\*

It is possible that dredging and filling in the waters of the State may be interpreted as a form of "pollution" as defined in Section 2 of Article 96A. There are recent indications that the U. S. Department of the Interior has adopted the view espoused in the latter interpretation of the definition.\*\*

Sections 12a and 15 of Article 96A specify the conditions and procedures under which the regulatory functions (related to the flow of navigable and non-navigable waters of the State) indicated previously are to be carried out. Section 12a states that

"[I]t shall be unlawful ... to construct ... [any] ... dam or waterway obstruction; or to make or construct, or permit to be made or constructed, any change therein or addition thereto; or to make, or permit to be made, any change in, addition to, or repair of, any existing waterway obstruction; or in any manner to change the course, current, or cross-section of any stream or body of water, wholly or partly, within this State, without a permit from the Department, in writing previously obtained, upon written application therefor to said Department."

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\* State of Maryland. Department of Water Resources - Water Resources Regulation 4.8, Section 1.10. Effective June 30, 1967.

\*\* On Aug. 20, 1968, the Department of the Interior requested in a letter to the Corps of Engineers, that they deny a permit for dredging and filling on St. Martins Creek and Isle of Wight and Assawoman Bays, Maryland, on the grounds that

"The proposed projects are located in coastal waters and are subject to the Water Quality Standards adopted by the State of Maryland and approved by the Department [of the Interior]. These standards indicate that beneficial water uses to be protected within the permit area include shellfish harvesting, water contact recreation, and propagation of fish, other aquatic life, and wildlife... .

"Dredging and filling operations proposed under these permit applications, combined with those permits already issued, will have severe adverse effects on fish and wildlife resources and natural aesthetic values in the Isle of Wight Bay-St. Martins River area."





Section 15 specifies that such a permit request shall be judged on the basis of whether the action for which a permit is requested will "provide for the greatest practicable utilization of the waters of the State and will adequately preserve public safety and ... promote the general public welfare ... ."

In summation, the language of Article 96A contains the most recent statutory definition of procedure and jurisdiction exercised by the State in matters involving actions in navigable and non-navigable waters of a dredging and filling and "improvement" nature.

#### Wetlands and the Present Law \*

The question can now be raised as to the relationship between wetlands, marsh and submerged lands and the legally delimited navigable and non-navigable waters of the State. Those land-forms known as wetlands or marshes, as defined by House Joint Resolution No. 2, in large measure fall within the previously defined limits of the navigable waters of the State.

In the case of marsh, wetland and submerged land and bottom that has been patented, granted or titled by the action of the Crown, Lord Proprietor or the State of Maryland, the extent of State rights and public use of such lands is limited to the public rights of navigation and fishing. However, such restrictions on full public use to not affect the classification of such lands as being within the navigable waters of the State.

An exception to the ownership rule is the salt marsh acreage - particularly on the lower Eastern Shore - which is not regularly affected by the ebb and flow of tide. Such land forms do not fall within the definition of navigable waters of the State. The Attorney General took note of this land category in 51 opinions and indicated that

"[I]n order to avoid any misunderstanding, it should be remarked that there can be no present doubt entertained as to the right of the owner of marshland not inundated by normal high water to fill and reclaim it. We recognize that as a practical matter the filling of marshland may have some adverse effect on fish and wildlife in the area, but the legislature has not yet considered such effect a sufficient cause for restriction of the property right immemorially accepted in this state."

Maryland has a present total of 321,000 acres of salt and fresh-water wetlands and marsh. This present total acreage represents an estimated loss of 24,000 acres from that believed to have existed at the time of earlier inventories.

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\* Statistics on wetland, marsh and submerged land or bottom acreages and losses were compiled by the Department of Game and Inland Fish and are subject to further refinement during the remainder of the Wetland Study.



Preliminary findings of the Wetland Study indicate that 121,000 acres of wetland affected regularly by the tide are found in Maryland, while 106,000 acres of salt marsh not regularly affected by tide are found in the State. Within these two categories, 6,800 acres of the former have been destroyed as compared with 2,500 acres of the latter.

Submerged land or bottom measured to a 6 foot depth totals 466,500 acres for the Chesapeake Bay area. Of this total, an estimated 10,900 acres has been destroyed by covering the bottom lands with spoil dredged up in undertaking various navigation improvement projects. Most of this spoil loss has occurred in the Baltimore metropolitan portion of the Chesapeake Bay.

With only rare and unique exceptions are marsh, wetland, or submerged lands riparian to or under the influence of free-flowing, non-navigable waters of the State found outside the defined limits of the waters of the State. The exceptions include pond shorelines, isolated marsh or freshwater meadows and perched water table areas. As previously indicated, the 50 year flood plain is included in the free-flowing, non-navigable waters of the State. Preliminary inventory results indicate that 74,000 acres or 79 percent of the inland wetlands fall within the scope of the legally defined free-flowing, non-navigable waters of the State.

Thus, much of the valuable wetland, marsh and submerged land in the State falls within four general legal categories. These are marsh, wetlands and submerged lands that, 1) fall within the navigable waters of the State and have not been granted, patented or titled and so remain in complete State ownership; 2) fall within the navigable waters of the State, but have been granted, patented or titled and thus restrict public rights of use to navigation and fishing while extending aspects of common law riparian doctrine to these waters; 3) fall within the free-flowing, non-navigable waters of the State where common law riparian doctrine applies; and 4) fall in neither the navigable nor the free-flowing, non-navigable category and where common law property rights are in full effect.

#### Present Governmental Policy Towards Wetlands

Present governmental policy towards wetlands, marshes and submerged lands reflects an increased recognition of the value of these land forms to the well-being of Maryland.

There are three levels of policy now applying to Maryland wetlands. These include 1) Federal policy; 2) State policy; and 3) State-local policy. In the case of Federal policy and State policy, they are both independent and interrelated to one another.

The central focus of Federal policy towards wetlands in Maryland is the requirement that any action potentially affecting navigation in the navigable waters of the State (dredging, filling, channel improvement, pile location, dock location, bulkheading, location of aerial wires and burial of submarine cables) must be specifically approved by





issuance of a permit from the U. S. Army Corps of Engineers. Requests for a permit are filed with the Corps by the individual, governmental agency or corporation undertaking the proposed action. The Corps, in turn, files a public notice of the requested action with interested parties including other Federal agencies and agencies of the State of Maryland. No public hearings are held, but written comments can be filed with the Corps. The ultimate decision on approval of the request rests with the Corps and in extraordinary instances with the U. S. Department of the Army and the Department of Defense.

A formal procedure does exist whereby the Federal conservation agencies comment to the Corps on the fish and wildlife effects of any specific action. On occasion, they request that the Corps deny issuance of certain permits.

As indicated earlier, there are recent indications that the U. S. Department of the Interior will review some of the permit requests on the basis of the mutually adopted Federal-State water quality standards. Such action would be based on evaluating the potential detrimental effects of a project upon the propagation of fish and wildlife.

The procedure followed in Maryland in commenting upon Corps of Engineers' Public Notices is as follows:

1. The Departments of Chesapeake Bay Affairs, Game and Inland Fish and Water Resources review notices and comment to the Corps, the Board of Public Works and each other.
2. The Department of Water Resources is now required to issue its own permit for those actions involving bulkheading, dredging and filling.
3. The Board of Public Works approves or disapproves of the action represented in a public notice and communicates the official position of the State directly to the Corps of Engineers. Such action is not taken until the Department of Water Resources has issued any required State permit.

State approval or disapproval does not in law determine the Corps' disposition of the request. However, as a general matter of courtesy, the Corps has in the past deferred to the State position.

State policy has traditionally reflected early common law. Present law has served to make more specific procedural actions which reflect the policy.

The State has permitted the dredging of sand and gravel from submerged lands. In so doing, the Board of Public Works has requested the advice of the Board of Natural Resources on granting permission for such removals and the compensation the State should receive for the material removed.





On August 1, 1968, the Board of Public Works adopted a new State policy on applications received by the Corps of Engineers and the Department of Water Resources for permits to dredge bottom materials from navigable waterways within the State to obtain fill for creating new fast land. This policy differentiates between the riparian's right to protect his property and gain access to navigable waters and the privilege - granted by the State - to fill and make fast land thereby extending the property of the owner into and over the navigable waters and property of the State. The recently adopted policy is as follows:

- 1 The applicant will agree to pay to the State of Maryland 10¢(or present market value) per ton (dry weight) for fill material dredged from the bottom of navigable waterways beyond any approved bulkhead line or pre-1862 land grant line.
- 2 In exchange for a quit-claim deed from the State of Maryland the land lying between the mean high water or pre-1862 land grant line and the bulkheads to be constructed, the applicant or its nominee will convey to the State of Maryland marshland of equal ecological value and of a kind and location acceptable to the Board of Natural Resources on an approximate ratio of 2 acres off such marshland for every 1 acre of land deeded (to the applicant) by the State of Maryland.
- 3 The applicant will provide a surety bond to the State in an amount equal to the estimated payments to be made to the State. If the Board of Public Works has no objections to the applicant's request for the permits, and if the applicant agrees to all conditions imposed by the State, then the Board of Public Works shall notify, in writing, the Corps of Engineers and the Department of Water Resources. The applicant's project will be under the direct supervision of the Department of Water Resources, who have developed a specific method of measuring . material dredged from the State-owned wetlands.

It should be pointed out that most requests for permission to dredge, fill and bulkhead represent actions consistent with riparian rights of navigation and protection of property. Therefore, most Corps of Engineers permit requests have, to this time, received carte blanche approval of the State agencies and the Board of Public Works. The future effect of the recently adopted policy may be to promote a more careful review of the "reasonableness" of the improvement sought when weighed against the public rights of fishing and navigation.

In addition, the Department of Water Resources may find it necessary to interpret Maryland's water quality standards in a way consistent with the policy reflected by the Department of the Interior. The potential impact of adopting such a policy is not now clear, but would tend to re-inforce the existing common law statutory doctrine of State ownership and responsibility for navigable waters and submerged tidal lands unless otherwise specified in statute.



A State wetland's acquisition program is administered by the Department of Game and Inland Fish. No State funds are presently used to acquire these properties. The funds are provided through the Bureau of Sport Fisheries and Wildlife in the U. S. Department of the Interior.

Local zoning policy is not uniform in the counties of the State. Not all counties have a zoning code and those that do are not consistent in their definition and delineation of marsh areas, flood plains, conservation areas, agricultural zones or open-space areas. No State statutory policy directives now exist which promote uniformity and wetland protection purposes within the county zoning codes of Maryland.

Tidal marsh properties are in one sense protected from indiscriminate changes in status by the devices previously outlined under Federal and State policy. However, the policy impact of making the 50 year flood plain a part of the "waters of the State" has not yet been utilized as a statutory requirement for flood plain zoning and, indirectly, protection of fresh-water marsh along the free-flowing, non-navigable waters consistent with Sections 12a and 15 of Article 96A. To the extent that flood plain zoning does exist at a county level in Maryland, the Montgomery County Code (Section 79-31) is the most specific and provides that no building permit shall be issued for any structure or alteration of an existing structure on land which lies within the fifty-year flood plain of any stream or drainage course, with the exception that a building permit may be issued for fences, public utilities and recreation and agricultural uses on such lands.

The experience of time and statutory trial and error has provided Maryland with a significant background of policy towards wetlands, marsh and submerged lands. However, it is not apparent that the full weight of the existing policy has been brought to bear on the exercise of State and local responsibility for the health, safety, welfare and well-being of the public and the protection of public rights.

### Legal Approaches to the Protection of Wetlands in Other States

Several states have statutory provisions relating to wetland, marsh and submerged lands and flood plains. In March of this year, the State Planning Department commissioned a study of the legal aspects of wetlands protection in Maryland and other states.\* The Maryland law has been cited previously. Exerpts from the consultant's report are cited below to provide insight on the experience of other states in legislating protection of wetlands, submerged lands and flood plains.

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\* Dimsey, J. Dennis, 1968. Wetlands - The Legal Context. Prepared for the Maryland State Planning Department. p.33.



A general categorization of legal approaches various states have taken indicates the following:

- I. Legislation is in effect which enables a state to acquire wetlands or any easement interest or right therein by the following means: eminent domain, purchase, exchange, gift, devise, lease, lease with an option to purchase, payment of unpaid tax liens on the land.
- II. Legislation exists which prohibits certain activities in wetland areas.
  - a. Many statutes provide that a project which involves filling, dredging, obstructing or altering the course of waters in wetland areas may not commence without obtaining a permit therefor; any conditions placed upon the work in the permit must be complied with. Many of these statutes provide for fines and imprisonment, and violations are subject to injunction or abatement.
  - b. A few statutes prohibit uses of wetlands inconsistent with conservation by zoning wetlands for conservation purposes.
  - c. One statute prohibits the use of earth-moving equipment in wetland areas, unless such equipment is registered with the Department of Water Resources.
- III. The Long Island (New York) Wetlands Act is unique. It provides that the State may enter into cooperative agreements with counties to maintain wetlands and may furnish one-half the cost of maintenance.
- IV. Legislation not directly related to wetlands, but affecting flood plains, has been enacted by some states. Such legislation requires that a county zone its flood plains to prevent encroachment and consequent damages.

A detailed synopsis of state statutes and selected court and informed solicited personal observation is provided in the consultant's report. Special attention is called to legislation of the following states:

1. Connecticut - wetlands acquisition
2. Florida - sale of tidal lands
3. Maine - regulation of dredging and filling
4. Massachusetts - regulation of dredging and filling
5. New Hampshire - regulation of dredging and filling





6. New York - cooperative management agreements
7. Rhode Island - wetland zoning and regulation of dredging and filling
8. Wisconsin - flood plain zoning

Recent court decisions in Massachusetts suggest that a legal basis exists for state regulation of marshland use in instances where private ownership and use rights exist which may be in conflict with the public purpose of protection of marine resources. Commissioner of Natural Resources v. S. Volpe and Co., 206 N. E. 2d666 (Mass. 1965) and Perry v. Director of Marine Fisheries (October 23, 1967) 7\* Regulation - through the police powers of the state - is the most direct legal approach to control of use of wetland, marsh and submerged lands identified - short of outright acquisition or control of development rights. Therefore, the significance of the Massachusetts court decisions cannot be ignored in analyzing Maryland's law and policy which clearly support the doctrine that protection of marine resources is a public purpose.

Legal Approaches Available to the  
State of Maryland in the Protection  
of Wetlands

Maryland law, policy and judicial experience relative to wetlands, marsh and submerged land provide a guide to identifying the legal tools available to augment the State's present capacity to prevent indiscriminate destruction of these landforms. In order to simplify presentation, the complexities of property law involved in a consideration of eminent domain and police power particularly are not cited below. A discussion of these points is contained in the consultant's report.\*\*

Outlined below are the three basic legal approaches available to protect wetlands under current Maryland law. State zoning is not included as it is not presently permissible under law. The zoning enabling act (Article 66B) now permits county zoning for maintaining the "health, safety and welfare", but not specifically flood plain protection purposes.

The three legal approaches are:

1. Assertion of State Ownership of Tidal Submerged Lands

Maryland common law, riparian doctrine and statute clearly indicates that lands subject to regular flooding by tides are within the public domain unless otherwise removed by patent, statute or act of the Board of Public Works.

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\* Dimsey, p. 8-9

\*\* Dimsey, p. 19-30





Nonetheless, the rights and privileges granted riparian owners to use of these lands do not eliminate the residual public rights of fishing and navigation. Under this approach, the State simply exercises its managerial powers over its own lands in an unencumbered way.

## 2. Acquisition

A number of state statutes empower municipalities or state agencies to acquire the fee, or lesser interests, in wetlands. Acquisition by any legally recognized means is usually authorized. Unless the acquisition is accomplished by some form of gift, considerable problems of expense may arise.

Several states have enacted statutes which specifically enable municipalities or state agencies to acquire title to wetlands through the exercise of the power of eminent domain. Since just compensation must be paid to the owner whenever land is taken by eminent domain, this approach may be utilized only to the extent that funds are provided for reimbursement to those owners whose land is taken. A state's power to take land by eminent domain for public purposes is a well-recognized legal right; authorizing the acquisition of wetlands by eminent domain is certainly one approach available to the Maryland Legislature.

Maryland has enacted a statute which may authorize the acquisition of wetlands. Section 357A of Article 66C of the Maryland Code empowers any city or county, the Maryland-National Capital Park and Planning Commission and the State Department of Forests and Parks to acquire the fee, or any lesser interest, in "open spaces." The definition of "open spaces" includes areas whose natural condition, if retained, would maintain or enhance the conservation of natural resources. It seems that this definition would include wetland areas.

## 3. Police Power

Under its police power, a state may regulate the use of wetlands in any way it sees fit, as long as the means chosen are reasonably calculated to achieve the desired result (i.e. the preservation of wetlands) and as long as the regulation is not so restrictive as to deprive the owner of all reasonable use of his land. As long as the restriction does not amount to a practical confiscation of the land, the state will not be required to compensate the landowner for the limitations placed upon the use of his land.

Statutes regulating dredging and filling in wetland areas are the most common type of police power regulation of wetland uses. Such an approach would not conflict with existing Maryland law.



Wetlands situated in flood plains may be preserved by means of flood plain zoning ordinances. Wisconsin enacted a statute which provided that if any county, city or town did not enact a reasonable and effective flood plain zoning ordinance by January 1, 1968, a state agency would have the power to adopt such an ordinance applicable to the county, city or village. This approach could be used by the Maryland legislature to ensure that each Maryland county has a flood plain zoning ordinance which would serve to preserve wetlands located in flood plains.













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